

FILED BY CLERK

MAR -2 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0220-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JOE SANTOS ARTIAGA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054798

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Joe Santos Artiaga

Florence
In Propria Persona

B R A M M E R, Judge.

¶1 Following a jury trial, petitioner Joe Artiaga was convicted of one count each of theft of a means of transportation, criminal trespass, and possession of burglary tools. The trial court sentenced him to time served on the criminal trespass conviction, and to concurrent, presumptive, enhanced prison terms of 11.25 and 3.75 years, respectively, on the other two convictions. We affirmed Artiaga's convictions and

sentences on appeal, although we modified the sentencing minute entry to classify the offenses as repetitive. *State v. Artiaga*, No. 2 CA-CR 2006-0294 (memorandum decision filed Nov. 1, 2007).

¶2 After two different appointed counsel notified the trial court they had found no colorable claims to raise on Artiaga's behalf, he was permitted to file a pro se petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The court summarily denied post-conviction relief on some of Artiaga's claims, and denied the rest of the claims after conducting a four-day evidentiary hearing, at which Artiaga, and trial and sentencing counsel testified. Artiaga now seeks review of the court's denial of his petition, in which he raised claims of ineffective assistance of trial, sentencing and appellate counsel. Absent a clear abuse of discretion, we will not disturb the trial court's ruling on post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶3 In his petition for review, Artiaga argues through advisory counsel that the trial court improperly denied his motion to continue the trial, a motion he filed after the court had granted his motion to remand to the grand jury. We note at the outset that, it appears this argument, in which Artiaga refers to the record and transcripts of the direct appeal in this matter rather than the record of the Rule 32 proceeding, is couched as a direct appeal from the trial court's denial of Artiaga's motion to continue. He argues "[c]ase law decided since the Memorandum decision in [his] case would have changed the outcome of the trial court's rulings with respect to the grand jury proceedings and his motion to continue the trial." We deny relief on this claim for several reasons. First,

because Artiaga previously challenged on appeal the denial of the motion to continue, he is precluded from doing so now pursuant to Rule 32.2(a). *See Artiaga*, No. 2 CA-CR 2006-0294, ¶ 5. Second, Artiaga did not raise this issue in his petition below. This court will not consider claims first raised on review. *See Ariz. R. Crim. P. 32.9(c)(1)(ii)* (petition for review to contain issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (petitioner may not present new issues in petition for review).¹

¶4 To the extent Artiaga challenges the trial court’s denial of his claim of ineffective assistance of trial counsel for failing to seek special action relief from the grand jury proceedings held in March 2006, we deny relief on that claim as well. To establish a claim of ineffective assistance of counsel, a defendant must show counsel’s performance was both deficient, based on prevailing professional norms, and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). A failure to establish either element of this test is fatal to the claim for relief. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). Here, the court correctly found that, even if trial counsel’s performance had been substandard, “there was no prejudice as the trial court essentially found no violations at the grand jury proceeding.” In addition, we note that Artiaga has attached exhibits that apparently were

¹Although Artiaga challenged the grand jury proceedings in his petition for post-conviction relief, he did so in the context of ineffective assistance of trial counsel. Moreover, he did not and could not have presented any argument based on 2011 case law in his petition below. Nor does Artiaga argue his claim is excepted from preclusion based on a significant change in the law. *See Ariz. R. Crim. P. 32.2(b) and 32.1(g)*.

not presented to the court below, to support a theory he likewise did not present to the court below. As such, we decline to consider them. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928.

¶5 Because Artiaga has not established the trial court abused its discretion in denying his petition for post-conviction relief, we grant the petition for review but deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge